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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

RANDALL TERRY, OPERATION RESCUE, REV. JAMES F. LISANTE,
THOMAS HERLIHY, JOHN DOES AND JANE DOES,
Petitioners,

—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Respondents,
CITY OF NEW YORK,
Respondent-Intervenor,
UNITED STATES OF AMERICA,
Respondent-Judgment Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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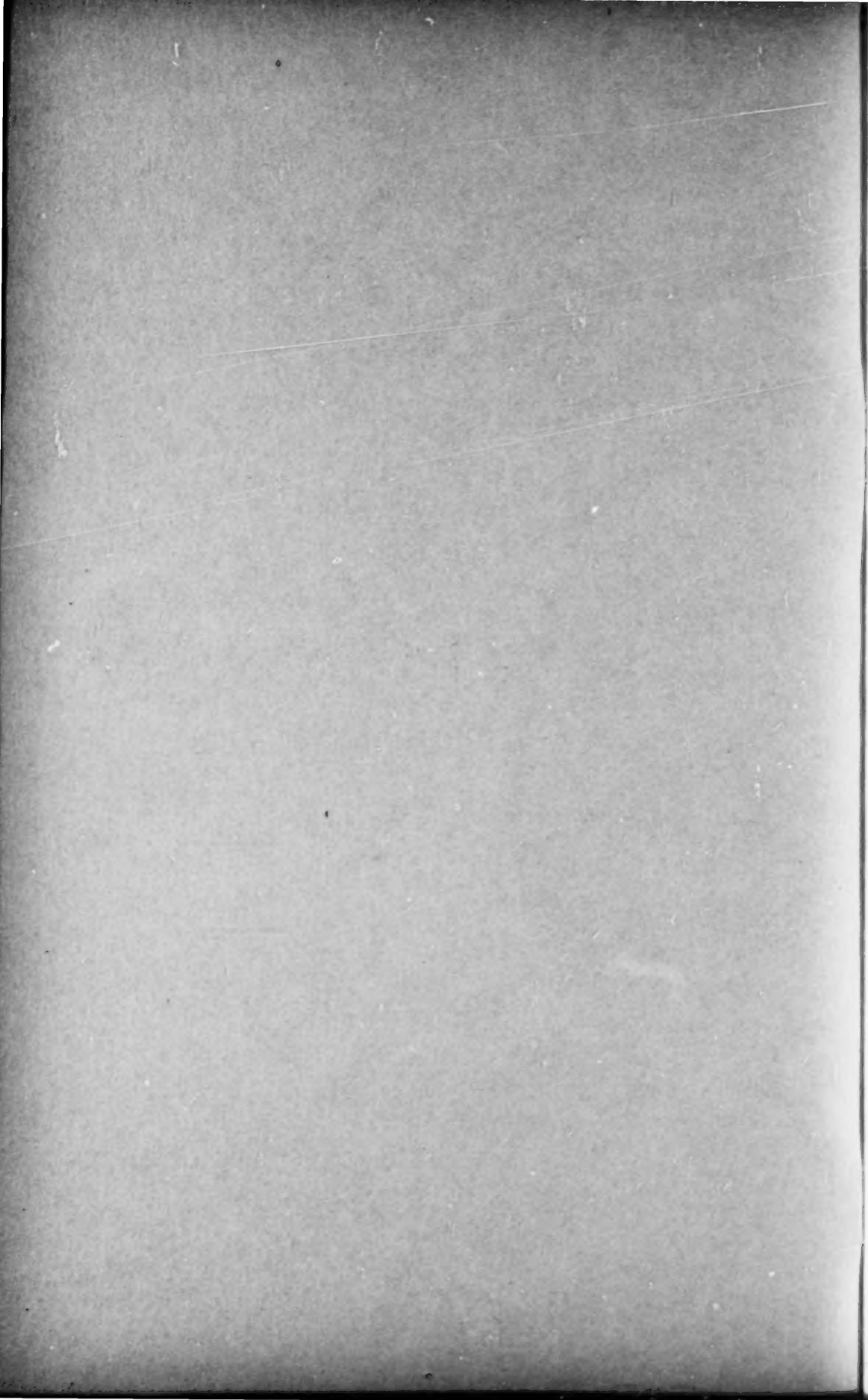


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—v.—

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN;
NEW YORK CITY CHAPTER OF THE NATIONAL ORGANI-
ZATION FOR WOMEN; NATIONAL ORGANIZATION FOR
WOMEN; RELIGIOUS COALITION FOR ABORTION
RIGHTS—NEW YORK METROPOLITAN AREA; NEW YORK
STATE NATIONAL ABORTION RIGHTS ACTION LEAGUE,
INC.; PLANNED PARENTHOOD OF NEW YORK CITY,
INC.; EASTERN WOMEN'S CENTER, INC.; PLANNED PAR-
ENTHOOD CLINIC (BRONX); PLANNED PARENTHOOD
CLINIC (BROOKLYN); PLANNED PARENTHOOD MARGA-
RET SANGER CLINIC (MANHATTAN); OB-GYN PAVILION;
THE CENTER FOR REPRODUCTIVE AND SEXUAL HEALTH;
VIP MEDICAL ASSOCIATES; BILL BAIRD INSTITUTE (SUF-
FOLK); BILL BAIRD INSTITUTE (NASSAU); DR. THOMAS
J. MULLIN; BILL BAIRD; REVEREND BEATRICE BLAIR;
RABBI DENNIS MATH; REVEREND DONALD MORLAN;
PRO CHOICE COALITION,

Respondents,

CITY OF NEW YORK,

Respondent-Intervenor,

UNITED STATES OF AMERICA,

Respondent-Judgment Creditor.

REPLY BRIEF FOR PETITIONERS

Petitioners Randall Terry, Operation Rescue, Rev. James P. Lisante and Thomas Herlihy herein reply to the arguments raised in the Respondents Brief In Opposition ("Opp. Br.").

ARGUMENT

I.

RESPONDENTS CANNOT INVOKE PENDENT JURISDICTION TO REMEDY THE ABSENCE OF FEDERAL SUBJECT MATTER JURISDICTION

Respondents argument (Opp. Br., pp. 11-16) that certiorari should not be granted because the judgments below are allegedly supportable on state law grounds turns this Court's consistent pendent jurisdiction jurisprudence on its head. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), stressed that federal pendent jurisdiction is discretionary and "need not be exercised in every case in which it has been found to exist." Moreover, the "federal claim must have substance sufficient to confer subject matter jurisdiction on the court," 383 U.S. at 725. Where the federal claim to which the state claims are pendent is dismissed prior to trial, "even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well," 383 U.S. at 726. *See also, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1297 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); 3A J.W. Moore, *Federal Practice* ¶ 18.07 [1.-3] (2d ed. 1988); 13B Wright, Miller & Cooper, *Federal Practice & Procedure* ¶ 3567.1 (2d ed. 1984).

This Court has consistently turned aside attempts to expand the narrow jurisdictional exception afforded by *Gibbs* into an independent basis for federal jurisdiction over essentially state law claims. *See, e.g., Finley v. United States*, ____ U.S. ____, 109 S.Ct. 2003 (1989); *Owen Equipment &*

Erection Co. v. Kroger, 437 U.S. 365 (1987); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973). Because the courts below erroneously concluded that Respondents had a substantial federal claim under 42 U.S.C. § 1985(3), they never addressed whether the *Gibbs* test for pendent jurisdiction is met. Petitioners' removal of Respondents' action as of right under 28 U.S.C. § 1441(b), which Respondents never contested, could not confer federal jurisdiction where it was lacking. *In re Winn*, 213 U.S. 458, 469 (1909). Therefore, the existence of colorable state law claims does not provide any basis for denial of certiorari here.

II.

THE FIRST AMENDMENT, THE RIGHT TO A FAIR TRIAL AND INDEPENDENT STATE GROUNDS

Other than a footnote, the Respondents' Brief is devoid of substantive argument concerning the First Amendment and the denial to Petitioners of a fair trial on "genuine disputes of substantial material facts" (Opp. Br. 20n.12). The circuit court decision, however, described the First Amendment issue as being the "principle question presented" in the appeal (A-3).

Respondents' dismissal of these issues is calculated to support the flawed argument that the lower court's holding that the Rescue demonstrations constituted trespass and public nuisance under State law, provide an independent basis to reject the Petition. The Respondents would have the First Amendment disregarded.

Defining the essence of an important and long-held principle, this Court has said that "no state law is above the Constitution." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). A related, often stated principle is that "First Amendment freedoms may not be infringed absent a compelling governmental interest." *United Steelworkers of America v. Sadlowski*, 457

U.S. 102, 111 (1982); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963); see also *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

Indeed, no compelling State interest has been shown in this case. Genuine disputes of substantial material facts exist regarding whether risks of abortion to the mother's physical and psychological health outweigh the alleged risk of delaying an abortion by a few hours or at most one day (refuted by Dr. Nathanson, (A-219-220)), the lack of proof as to demonstrators' intent regarding class-based animus or to violate the injunction, interference with the Right to Travel, and the availability of the defense of "necessity" to protect the mother's and unborn child's life and health (Pet. at 16-19). These issues reach co-extensively to elements of the trial court's findings of "public nuisance" and "trespass". Depending on factual determinations, following discovery and a full hearing, the requisite threatened harm to public health and safety may not be found; present defenses may be proven or additional defenses may arise. The Respondents propose that the trial court's failure to permit discovery and a full hearing of the issues, and its failure to consider the point-by-point refutation of Respondents claims' in testimony by Dr. Nathanson (A-204 to 225) and Dr. O'Calaghan (A-237 to 250), be affirmed. Petitioners respectfully urge this Court to allow a fair trial on these issues and to deny the Respondents' attempt to short circuit proper constitutional adjudication on alleged State law grounds.

III.

THE DISTRICT COURT'S FINES WERE AN UNCONDITIONAL SENTENCE DECLARED IN ADVANCE FOR DETERRENT EFFECT AND WERE THEREFORE CRIMINAL IN NATURE

Respondents (Opp. Br. 27) state that, "Petitioners neglect even to mention * * * *Spallone v. United States*, 110 S.Ct. 625 (1990)," apparently overlooking Petitioners' citation of

Spallone (Pet. 24-25), and its inclusion in the Table of Cases (Pet. x).

Respondents also fail to notice the fundamental distinction between coercion and deterrence, as explained by this Court in *Hicks v. Feiock*, 485 U.S. 624, 631, 634 (1988) and *Shillitani v. United States*, 384 U.S. 364, 370 n.5 (1966). As held in *Feiock*, analysis must begin by focusing on the contempt proceeding itself:

"The critical features are the substance of the [contempt] proceeding and the character of the relief that the proceeding will afford." 485 U.S. at 631.

The contempt proceeding before the district court could be compared to *Spallone* if the district court had imposed a fine *unless* Petitioner Randall Terry promised *not* to engage in the conduct complained of and ordered his constituents not to do so. The fines would then be coercive because Petitioner could have *avoided* the fines by making the promise and giving the order. See *Feiock*, at 635, n.7.

Instead, the district court merely declared in advance the unconditional sentence which would be imposed if the amended Temporary Restraining Order were to be violated. The deterrent effect of the threatened unconditional sentence was derived from its absolute character. Any person who violated the order would be accused of a completed act of disobedience in any contempt proceeding which ensued. The unconditional sentence of a \$25,000 fine for each day the order was violated would be imposed upon a finding of guilt.

Mere knowledge of the unconditional consequences at the time of violation of a court order, whether those consequences are imprisonment or a fine or both, do not provide an opportunity, *at the time of the contempt proceeding*, to alter a completed act of disobedience. Thus, the substance of the contempt proceeding in the district court was to punish a completed act of disobedience and the "critical feature" of the remedy sought in that proceeding was the imposition of a

threatened unconditional fine without any opportunity to purge the alleged contempt. See *Feiock*, at 635, n.7.

Because they clearly lack the procedural protections required by this Court in proceedings for criminal contempt, and because Petitioners' counsel objected on this ground in the district court and in the court of appeals, the district court's contempt fines must be set aside.

IV.

SECTION 1985(3): CLASS-BASED ANIMUS

Seven years have elapsed since this Court's decision in *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983). During that time, a substantial "further study"¹ of § 1985(3) has taken place in the lower federal courts. Despite the Respondents' protests, the Petitioners' chart succinctly and accurately demonstrates the intolerable and widespread conflicts among the circuits and within the circuits on an important and recurring statutory issue: the scope of the class-based animus component of § 1985(3).

Either § 1985(3) is limited by the clear Congressional intent of 1871 prohibiting racial² or racially motivated political animus³ or the statute is "tied to evolving notions of equality and citizenship" (A-40), thus permitting judicial divining like that of the Second Circuit which allows any subgroup (women abortion-seekers) of a generally protected class (women) to receive the statute's protection, thereby turning § 1985(3) into a general federal tort law.

The time could not be riper for this Court to address itself to the vexing issue of the scope of permissible class-based

1 *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.)

2 *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173 (10th Cir. 1983)

3 *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986)

animus and grant its desperately needed guidance to the lower federal courts.

V.

SECTION 1985(3): RIGHT TO TRAVEL

The Respondents predictably attempt to bolster their Right to Travel claim by reliance on *Griffin v. Breckenridge*, 403 U.S. 88 (1971). A factual comparison of the conduct in *Griffin*, which was so close to the "core" of § 1985(3), to the public Rescue demonstrations reveals the following:

- *Griffin* involved the act of forcibly blocking travel on a State highway. Rescues occur on public sidewalks in the traditional manner of peaceful Civil Rights sit-in demonstrations.

- *Griffin* involved detention, the brutal use of deadly force and immediate threats of death and serious injury to halt travel upon a highway. Rescues constitute passive, non-violent demonstrations to protest the act of abortion at clinics and have nothing to do with free travel on public highways or streets.

- *Griffin* involved *racially, class based animus*, proscribed by law. Rescues involve the intent to non-violently protest abortion, to protect unborn human life and the mother, which has not been proscribed for purposes of Section 1985(3).

- *Griffin* involved violent, racially based assaults interfering with highway travel and Civil Rights activity. Rescues, involve peaceful First Amendment activity such as display of placards, singing, chanting, counseling and praying, as well as passively blocking the entrance of abortion facilities as a means of protecting and protesting the termination of unborn human life.

This "unusual and broad view"⁴ of the Right to Travel embraced by the Second Circuit must be addressed and

4 *Valley Forge College v. Americans United*, 454 U.S. 464, 470 (1982)

rejected by this Court, lest the combination of the Right to Travel and § 1985(3) transfigure the statute "to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin*, 403 U.S. at 101; *Scott*, 463 U.S. at 834.

CONCLUSION

For all of the reasons stated above and in the Petition, it is respectfully submitted that the Petition for Certiorari should be granted and that the issues raised therein should be addressed by the Justices of this Court.

Dated: May 3, 1990
New York, New York

Respectfully submitted,

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